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SUPREME COURT, U. S.

No. 1631

Supreme Court, U
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E. ROBERT SEAVER,

In the

Supreme Court of the United States

OCTOBER TERM, 1971

RALPH NOE,

Petitioner,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Scheffer Press, Inc.—ANdover 3-6850

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MAY IT PLEASE THE COURT:

I.

The petition for writ of certiorari should be denied because only questions of Iowa law are involved.

The petition asserts that three federal questions are presented by the opinion of the Illinois Appellate Court (p. 3). It is even claimed that these arise under the Federal Employers Liability Act (p. 2), notwithstanding petitioner was not an employee of respondent and hence had no rights under that Act.

In reality, the only question presented is whether the Illinois Appellate Court correctly applied the Iowa law

of Last Clear Chance in a non-employee case involving a claimed violation of a Railroad Safety Act. Specifically, whether petitioner could rely on that doctrine to avoid his contributory negligence when he contended that the air brakes on respondent's train were defective, with the result it was unable to stop in time to avoid striking petitioner's crane. This is not only manifest throughout the entire opinion of the Appellate Court, but, specifically, by its last sentence, which states: "Regardless of when the alleged violation of the Safety Appliance Act occurred plaintiff has failed to present a case for the application of the doctrine of Last Clear Chance [under Iowa law] and the judgment must be reversed" (Pn., p. 11A).

It is settled that the mere interpretation of a statute of another state by a state court does not present a federal question. *Western L. Indemnity Co.* v. *Rupp,* 235 U.S. 261, 275. Hence, it follows that certiorari to a state court does not lie in order to determine whether it has correctly interpreted the common law of another state.

This Court, in *Crane* v. *Cedar Rapids & Iowa City Ry. Co.,* 395 U.S. 194, affirming the Supreme Court of Iowa (..... Iowa .....), 160 N.W. 2d 838, held that, whether contributory negligence was a defense in an action based on a Safety Appliance Act violation was dependent upon state law. The Iowa Supreme Court had held that it was. In *Fairport, Painesville & Eastern R.R. Co.* v. *Meredith,* 292 U.S. 589, 598, it held that in a non-employee case a state was free to apply its own doctrine of Last Clear Chance in a Safety Appliance case. Thus, federal questions that were involved at the Illinois appellate level have been authoritatively settled by this Court. The Illinois Appellate Court merely interpreted Iowa law as to the legal effect of the claimed Safety Act violation and held petitioner

could not recover under the record before it. Whether its determination was right or wrong raises no federal question.

In more detail, plaintiff violated a statute that required notice to the respondent railroad before moving his crane across the crossing (Pn. 8A). This violation of the statute, under the law of Iowa, was contributory negligence as a matter of law in the absence of a legal excuse, which petitioner did not show (Pn. 8A). Petitioner's only escape from his contributory negligence was to produce evidence that respondent had the last clear chance to avoid the accident. But petitioner introduced the testimony of an alleged "expert" to prove that the train should have been brought to a stop after respondent discovered petitioner's presence, but that respondent's employees were unable to do so because the train's brakes worked "ineffectively" (Pn. 4A, 5A). Under the law of Iowa, as interpreted by the Illinois Appellate Court, the doctrine of Last Clear Chance is not applicable if defendant's conduct, before the peril arose, even though wrongful, made him unable to avoid the accident. *Vreugdenhil* v. *Kunkel,* 256 Iowa 460, 127 N.W. 2d 630, 634; *Menke* v. *Peterschmidt,* 246 Iowa 722, 69 N.W. 2d 65, 68. In brief, the reason petitioner lost his case in the Illinois Appellate Court was that he tried to maintain simultaneously the truth of two mutually self-exclusive propositions; namely, (1) respondent had the "last clear chance" to avoid the accident after discovering petitioner's presence; but (2) respondent was unable to prevent the accident after discovering his presence because the air brakes on the train were allegedly defective.

To argue further that only questions of Iowa law are involved would be only to belabor the obvious. However, we can not close this brief without pointing out that the alleged "uncontradicted fact 4" at p. 6 is not a fact at all,

and the statement in the petition that the Appellate Court held that "the Federal Safety Appliance Act did not apply" (p. 4) is plainly erroneous.

CONCLUSION

The instant petition is typical of the all too numerous frivolous petitions that overburden this Court and require time and attention by it that could be devoted to legal issues of national importance. The petition for writ of certiorari should be denied.

Respectfully submitted,

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